SUPREME COURT U. S.

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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS

UNITED STATES OF AMERICA, PETITIONER

v.

LEWIS WARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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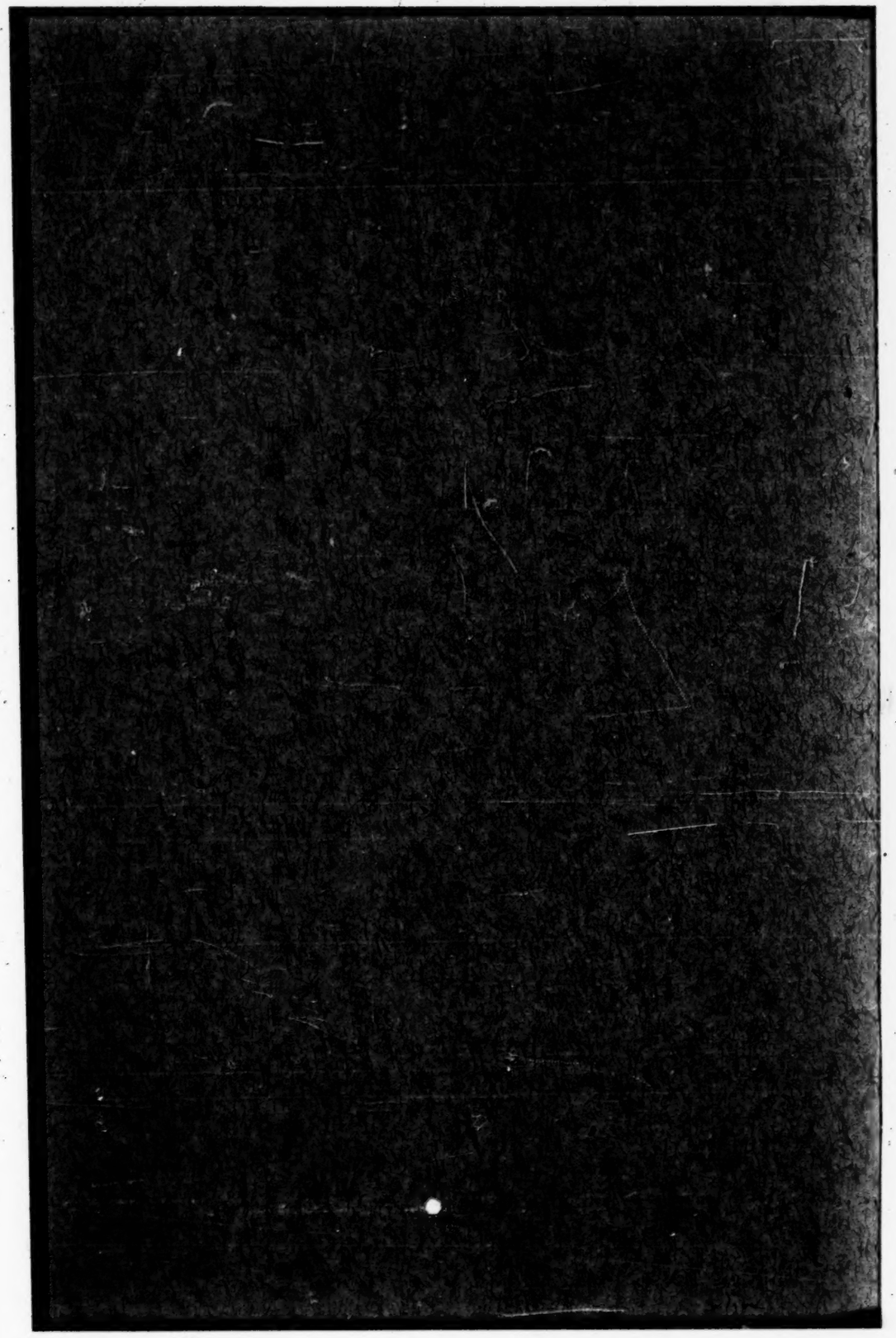

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LEWIS WARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Seventh Circuit, entered on August 19, 1969, in the above cases.

OPINIONS BELOW

The opinions of the court of appeals (Appendix, *infra*, pp. 13–23, 25–27) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on August 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether persons charged with violating 26 U.S.C. 4742(a) can assert the privilege against self-incrimination as a defense to such a prosecution.

2. Whether this Court's decisions in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, should be given retroactive effect.

STATUTES INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744(a) provides:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

The government here seeks review of the decisions of the Seventh Circuit in two cases treated separately by that court but involving the identical question.[1] In each case the respondent was convicted of violations of 26 U.S.C. 4742(a) and 4744(a)(1), involving the unlawful trafficking in marihuana. Both convictions had become final prior to May 19, 1969, the date when this Court decided, in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, that one charged with violating Section 4744(a) could assert the privilege against self-incrimination as a complete defense to a prosecution under that section. Neither respondent had invoked the Fifth Amendment privilege before his conviction had become final. See *United States* v. *Santos*, 385 F. 2d 43 (C.A. 7), certiorari denied, 390 U.S. 954; *United States* v. *Ward*, 369 F. 2d 909 (C.A. 7).

Previous to its decisions in *Leary* and *Covington*, this Court had held, on January 29, 1968—in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85—that since the statutory schemes involved in those cases (taxation of wagers and firearms) required an individual whose activities were regulated by those statutes to file documents with the government containing information incriminating under State or other federal laws, such an individual could properly assert the privilege against self-incrimination as a complete defense to charges arising from a

[1] Rule 23(5) of the Rules of this Court authorizes the filing of a single certiorari petition in such circumstances.

failure to file the required forms. Thereafter, respondents in the present cases filed their separate motions to vacate pursuant to 28 U.S.C. 2255, alleging that the rationale of *Marchetti-Grosso-Haynes* was equally applicable to the marihuana taxing scheme, and that they had not waived their constitutional privilege by failing to raise that defense either at trial or on direct appeal. They requested a reversal of all counts. The sentencing court denied relief. While respondents' appeals were pending in the Seventh Circuit, this Court, on May 19, 1969, decided the *Leary* and *Covington* cases.

On August 19, 1969, the court of appeals reversed the sentencing court in both of the cases of which review is here sought. It held that *Leary* required the reversal of respondents' convictions under Section 4744(a), and 4742(a) as well, since "the order form mandate of § 4742(a) compels the criminal transferor to require the transferee to obtain an order form and to identify him not only as a transferor of marihuana but as a transferor who has not registered and paid the occupational tax required by §§ 4751–4753" (*Santos*, *infra*, p. 18). The court recognized that the Second Circuit had reached a contrary conclusion as to the effect of the privilege upon Section 4742(a) in *United States* v. *Buie*, 407 F. 2d 905, certiorari granted *sub nom. Buie* v. *United States*, 395 U.S. 976.[2] It declined, however, to follow the reasoning of the Second Circuit. Turning to the question of retrospective application, the Seventh Circuit decided that

[2] *Buie* is presently *sub judice*, as No. 271, this Term, having been argued on October 15, 1969.

such an application was appropriate, relying primarily upon the reasoning of the Fourth Circuit in a case in which that court had applied *Haynes* retroactively (*United States* v. *Miller*, 406 F. 2d 1100). Finally, the Seventh Circuit agreed with respondents' claim that they had not waived their Fifth Amendment privilege by failing to assert it before their convictions had become final.

REASONS FOR GRANTING THE WRIT

1. As indicated previously, the decision below is in direct conflict with the holding of the Second Circuit in the *Buie* case. Moreover, in reversing respondents' convictions on counts charging violations of Section 4742(a), the Seventh Circuit has decided an issue presently under consideration by this Court, upon review of the court of appeals' decision in *Buie*. That question, in substance, is whether a *transferor* of marihuana can properly invoke the privilege against self-incrimination as a complete defense to a charge of violating the Marihuana Tax Act's requirement that transactions in marihuana are lawful only if done pursuant to a written order form which the *transferee* must secure. If, contrary to the Seventh Circuit, this Court decides the issue in *Buie* favorably to the government, reversal of the decision below would be required, and a grant of certiorari would be necessary to effect such a disposition.

If, on the other hand, the Court sustains the petitioner's position in *Buie*, and thereby agrees with the Seventh Circuit, the questions whether this ruling should be applied retroactively and whether the privilege had been waived would be clearly presented in

the instant case, and would warrant a grant of certiorari so as to dispose of these troublesome but important matters. In this context, our opposition to retroactive application of such a rule would be founded upon identical considerations which lead us to oppose retroactive application of *Leary* and *Covington*. Accordingly, the ensuing discussion applies equally to convictions under Section 4744(a) (*Leary* and *Covington*) and Section 4742(a) (*Buie*, if resolved adversely to the government), both of which are involved here.

2. Squarely presented in this petition is the issue whether the *Leary* and *Covington* decisions are to be given retroactive application to defendants who had not asserted the Fifth Amendment privilege at trial. In our view, such an assertion, made for the first time years after trial, cannot meaningfully be viewed as timely. Had the privilege been asserted at the proper time, the government would have been put to the choice of insisting on the position it was then taking that the privilege did not furnish a defense or of turning respondents and the evidence against them over to the State for prosecution under State laws directly forbidding possession of marihuana. Respondents should properly be held to the consequences which flow from the fact that the defense of self-incrimination was not timely raised.

At all events, it is our contention that *Leary* and *Covington* should be given prospective application only, and that the conflicting conclusions reached in the lower courts, not only with regard to the retroactivity of *Leary* and *Covington*, but *Marchetti*,

Grosso, and *Haynes* as well, call for specific guidance from this Court. In addition to the Seventh Circuit, the Eighth Circuit has given retroactive effect to *Leary* and *Covington* in a case identical to this one, in that it involves both Sections 4744(a) and 4744(a) (*Rowell* v. *United States*, No. 19,588, decided July 23, 1969).[3] And, prior to the decisions in *Leary* and *Covington*, a district court in the Fifth Circuit considered a collateral attack upon a conviction under Section 4744(a) founded upon an assertion that *Marchetti*, *Grosso*, and *Haynes* should be applied retroactively and construed so as to encompass the marihuana statute. That contention was rejected, however, and a motion to appeal *in forma pauperis* was denied by the court of appeals, *United States* v. *Miller* (C.A. 5), decided November 25, 1969, certiorari denied, No. 106 Misc., this Term (October 13, 1969). See also *Williams* v. *United States*, 291 F. Supp. 376 (D. Minn.).[4] As to the wagering tax cases, see *United*

[3] Contrariwise, a district court in the same circuit has denied retroactive application of those decisions (*Borrett* v. *United States*, 300 F. Supp. 1060 (D. Minn.)).

[4] And see *Sepulveda* v. *United States*, No. 232–68 (C.A. 10), decided August 11, 1969, holding that a defendant convicted in 1960 for the second time of violating the marihuana laws and still serving the sentence imposed when that conviction would be denied relief since his reliance now, for the first time, upon the privilege against self-incrimination, both as to that conviction and the earlier one in 1954, was not timely. The Tenth Circuit noted that it had not considered the retroactivity question because it was unnecessary to do so in that case. It is our view that, whether or not a defendant had raised the privilege at trial, he should be given no relief if his conviction had become final before May 19, 1969. Otherwise, each collateral challenge would require a hearing to determine whether there had been an intelligent waiver of the privilege.

States v. *Lucia*, 6 Crim. L. Rep. 2021 (C.A. 5), decided September 17, 1969, and *Graham* v. *United States*, 407 F. 2d 1313 (C.A. 6), pending on petition for a writ of certiorari, No. 294 Misc., this Term, reaching opposite results. See also, *Mackey* v. *United States*, 411 F. 2d 504 (C.A. 7). As to convictions under the firearms statute, see *United States* v. *Miller*, 406 F. 2d 1100 (C.A. 4), according retroactive application to *Haynes*, while several district courts have rejected retroactivity in this context (*Stoney* v. *United States*, 302 F. Supp. 145 (E.D. Mo.); *Horton* v. *United States*, 300 F. Supp. 1332 (D. Conn.); *Wainwright* v. *United States*, 289 F. Supp. 820 (E.D. Tenn.)). The Sixth Circuit is presently considering this issue in *Decker* v. *United States*, No. 19,846.

Our argument that *Leary* and *Covington* should be given prospective application necessarily starts with the recognition that "the Constitution neither prohibits nor requires retrospective effect" (*Linkletter* v. *Walker*, 381 U.S. 618, 629), and a consideration of the criteria established by this Court for determining retroactivity, last enunciated in *Halliday* v. *United States*, 394 U.S. 831, 832. Those criteria are (1) the purpose of the newly fashioned rule; (2) the extent of reliance upon the prior rule; and (3) the effect that retroactive application would have upon the administration of justice. See also *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, 394 U.S. 244, 249. It does not demean the importance of the privilege against self-incrimination to observe that its purpose does not relate alone to protecting

the innocent from conviction, but more importantly "to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'" (*Tehan* v. *Shott*, 382 U.S. 406, 415). In sharp contrast to constitutional rules which have been given retroactive application because they touched closely upon the truth-determining process or involved safeguards against infecting a criminal proceeding with the clear danger of convicting the innocent (*e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *Jackson* v. *Denno*, 378 U.S. 368; *Gideon* v. *Wainwright*, 372 U.S. 335), the Fifth Amendment privilege stands as a protection of quite different values—"values reflecting the concern of our society for the right of each individual to be let alone" (*Tehan* v. *Shott*, *supra*, 382 U.S. at 416). While these latter values are indeed important, from the standpoint of determining retroactivity they do not furnish a basis for other than prospective application of constitutional decisions in that area, particularly in a situation where, as here, there was no likelihood whatsoever that the accused were innocent of their crimes, but were motivated not to comply with federal order form and tax requirements merely by the threat of what else might have been revealed by compliance.

The second criterion, the extent to which law enforcement authorities have relied upon the old standard, must take into account the fact that prior to *Leary* and *Covington* two circuits which handle a large volume of cases involving the marihuana tax laws had, on several recent occasions, rejected the conten-

tion successfully urged in *Leary* and *Covington*, and had been implicitly upheld in this regard by this Court. *E.g.*, *Browning* v. *United States*, 366 F. 2d 420 (C.A. 9); *Rule* v. *United States*, 362 F. 2d 215 (C.A. 5), certiorari denied, 385 U.S. 1018; *Haynes* v. *United States*, 339 F. 2d 30 (C.A. 5), certiorari denied, 380 U.S. 924; *Palmer* v. *United States*, 332 F. 2d 788 (C.A. 9). Indeed, as recently as the date on which the Court granted certiorari in *Marchetti* (January 9, 1967), it declined to hear a challenge of the Marihuana Tax Act on Fifth Amendment grounds in the *Rule* case. There can be little doubt, therefore, that law enforcement authorities were justified in believing that there was no constitutional violation in denying an accused transferee of marihuana the right to defend himself against a charge of violating Section 4744(a) through assertion of his privilege against self-incrimination.

The third criterion, the effect of retroactive application of the new standard upon the administration of justice, also militates against applying *Leary* and *Covington* retroactively. Substantial numbers of defendants are serving sentences imposed by courts throughout the nation as a result of pre-*Leary* and pre-*Covington* convictions for violating Section 4744(a). Numerous collateral attacks similar to the ones made by respondents have occurred since May 19, 1969, the date those cases were decided. In the Southern District of Texas alone, 44 such applications for relief were filed between May 19 and October 31, 1969. At this time 26 have been denied or withdrawn, and the remainder are still pending. Retroactive ap-

plication of *Leary* and *Covington* would require consideration of the timeliness of each such claim, and in instances where the accused had not asserted the privilege at trial, a hearing to determine whether there had been an intelligent waiver. The error complained of is not so fundamental that it should be allowed at this time to disrupt seriously the administration of our criminal laws and require the upsetting of all final convictions based upon it.

3. At all events, the question of the retroactivity of *Leary* and *Covington* is one of substantial importance in the administration of criminal justice in the federal judicial system. It is plainly an issue of recurring significance which warrants resolution by this Court. Should the Court not accept the government's position on the merits in *Buie*, the instant case provides an appropriate vehicle for this Court's consideration of that issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1969.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1968—APRIL SESSION, 1969

No. 16985

EFRAIN SANTOS, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

AUGUST 19, 1969

Before MAJOR and HASTINGS, Senior Circuit Judges and CUMMINGS, Circuit Judge.

HASTINGS, *Senior Circuit Judge.* Efrain Santos appeals from the district court's denial of his motion, filed pursuant to 28 U.S.C.A. § 2255, for collateral relief from a judgment of conviction entered by that court following a jury trial.

The record before us establishes that appellant was charged in five counts of a six-count indictment with violating federal marihuana and conspiracy statutes. Two of such counts charged a conspiracy while the other three charged substantive offenses. On November 15, 1966, appellant was found guilty by a jury verdict and was convicted of violating 26 U.S.C.A. §§ 4742(a), 4744(a)(1) and 18 U.S.C.A. § 371. His conviction was affirmed by this court on November 13,

1967, in *United States* v. *Santos*, 7 Cir., 385 F. 2d 43 (1967), *cert. denied*, 390 U.S. 954.

Seeking collateral relief from his conviction, appellant claimed that he was deprived of the effective assistance of counsel at the trial level[1] and that the marihuana statutes under which he was convicted contravene the Fifth Amendment privilege against self-incrimination.[2]

In denying appellant's § 2255 petition for relief on May 15, 1968, the trial court, with deference to then existing precedent, did not find the challenged marihuana statutes unconstitutional and stated that if such laws should be held unconstitutional "* * * it should be done by the Supreme and Appellate Courts which have previously upheld the statutes against constitutional attacks." The reasoning espoused in the recent Supreme Court decisions of *Leary* v. *United States*, 395 U.S. 6 (May 19, 1969), and *United States* v. *Covington*, 395 U.S. 57 (May 19, 1969), compels us to reverse the trial court's order in dismissing appellant's § 2255 petition for relief.

The privilege against self-incrimination as guaranteed by the Fifth Amendment provides a full defense to the substantive counts charged against Santos. Further, the conspiracy counts must fall with the underlying substantive counts. See *Grosso* v. *United States*, 390 U.S. 62, 70 (1968).

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[1] In view of our disposition of this case, we do not deem it necessary to reach the question of whether appellant was denied effective assistance of counsel.

[2] Insofar as relevant the Fifth Amendment provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

It appears clear that *Leary* requires a reversal of Santos' conviction under § 4744(a)(1).[3] In *Leary*, the Supreme Court reversed the petitioner's conviction under 26 U.S.C.A. § 4744(a)(2) holding that the "petitioner's invocation of the privilege [against self-incrimination]' was proper and * * * should have provided a full defense" to the count alleging a violation of § 4744(a)(2). The necessary implication of *Leary* is that the substantive violations under § 4744(a)(1) in the instant case can not be sustained. No reasonable grounds exist for distinguishing between a conviction premised on § 4744(a)(1) and a conviction obtained under § 4744(a)(2). Both provisions of § 4744 share identical constitutional infirmities and are equally subject to the privilege against self-incrimination, as guaranteed by the Fifth Amendment. These provisions of § 4744, when viewed within the context of the comprehensive statutory scheme of the Marihuana Tax Act,[4] expose

[3] Insofar as relevant, 26 U.S.C.A. § 4744(a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

"(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

"(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained."

[4] In *Leary*, *supra* at 14–15, the Supreme Court aptly summarizes the statutory scheme of the Marihuana Tax Act:

"The Marijuana Tax Act has two main subparts: The first imposes a tax on transfers of marijuana, the second an occupational tax upon those who deal in the drug. It is convenient to begin with the occupational tax provisions, 26 U.S.C. §§ 4751–4753.

"Section 4751 provides that all persons who 'deal in' marijuana shall be subject to an annual occupational tax. Subsections require that specified categories of persons, such as im-

a person to a "real and appreciable" risk of self-incrimination, within the rationale of *Leary* v. *United States, supra*; *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968).

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porters, producers, physicians, researchers, and millers pay varying rates of tax per year. See §§ 4751(1)–(4), (6). Persons who 'deal in' marijuana but do not fall into any of the specified categories are required to pay $3 per year. See § 4751(5). Section 4753 provides that at the time of paying the tax the taxpayer must 'register his name or style and his place or places of business' at the nearest district office of the Internal Revenue Service.

"The first of the transfer tax provisions, 26 U.S.C. § 4741, imposes a tax 'upon all transfers of marijuana which are required by § 4742 to be carried out pursuant to written order forms.' Section 4741 further provides that on transfers to persons registered under § 4753 the tax is $1 per ounce, while on transfers to persons not so registered the tax is $100 per ounce. The tax is required to be paid by the transferee 'at the time of securing each order form.' With certain exceptions not here relevant, § 4742 makes it unlawful for any person, 'whether or not required to pay a special tax and register under sections 4751 to 4753,' to transfer marijuana except pursuant to a written order form to be obtained by the transferee. A regulation, 26 CFR § 152.69, provides that the order form must show the name and address of the transferor and transferee; their § 4753 registration numbers, if they are registered; and the quantity of marijuana transferred. Another regulation, 26 CFR § 152.66, requires the transferee to submit an application containing these data in order to obtain the form. Section 4742(d) of the Act requires the Internal Revenue Service to 'preserve' in its records a duplicate copy of each order form which it issues.

"Another statutory provision, 26 U.S.C. § 4773, assures that the information contained in the order form will be available to law enforcement officials. That section provides that the duplicate order forms required to be kept by the Internal Revenue Serv-

We are also of the view that the Fifth Amendment privilege against self-incrimination may be invoked as a defense to a charge premised upon § 4742(a)[5] and find that Santos' conviction under this section must fall under the weight of *Leary* and the related cases of *Marchetti* v. *United States, supra*, *Grosso* v. *United States, supra*, and *Haynes* v. *United States, supra*. As noted in *Leary*, "§ 4742 makes it unlawful for any person, 'whether or not required to pay a special tax and register under sections 4751 to 4753,' to transfer marijuana except pursuant to a written order form to be obtained from the transferee." Thus, before a legal transfer of marihuana can be made, the transferor is statutorily obliged, under pain

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ice shall be open to inspection by Treasury personnel and state and local officials charged with enforcement of marijuana laws, and that upon payment of a fee such officials shall be furnished copies of the forms.

"Finally, 26 U.S.C. § 4744(a) makes it unlawful for a transferee required to pay the § 4741(a) transfer tax either to acquire marijuana without having paid the tax or to transport, conceal, or facilitate the transportation or concealment of, any marijuana so acquired."

[5] Insofar as relevant, 26 U.S.C.A. § 4742 provides:

"(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary [of the Treasury] or his delegate.

* * * * *

"(c) * * * whenever any such forms are sold, the Secretary or his delegate shall cause the date of sale, *the name and address of the proposed vendor*, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same." (Emphasis added.)

of criminal prosecution, to have the transferee obtain the required order form. To secure the order form, the transferee, pursuant to § 4742, *supra*, must disclose the name and address of the proposed transferor.

When considered in conjunction with other interrelated sections of the Marihuana Tax Act, the net legal effect of § 4742(a) is to place the criminal transferor in the position of being statutorily *required* to provide the government with information "which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt." *Marchetti v. United States*, *supra* at 48. This is true since the order form mandate of § 4742(a) compels the criminal transferor to require the transferee to obtain an order form and to identify him not only as a transferor of marihuana but as a transferor who has not registered and paid the occupational tax required by §§ 4751–4753. This interplay of the sections exposes the criminal transferor to a real hazard of self-incrimination since such information becomes readily available to investigate authorities.

We see no legally significant reason for distinguishing between the *Marchetti* type statutory scheme, in which the defendant is required to personally incriminate himself, and the more subtle statutory scheme, as is found in the instant case, where the law requires the defendant to compel another to divulge equally incriminating information. Both statutory schemes confront the defendant with a real and substantial risk of incrimination. The privilege against self-incrimination provides a complete defense to prosecution for failure to comply with either incriminating scheme. There is a "right not to be criminally liable for one's previous failure to obey a statute

which required an incriminatory act." *Leary* v. *United States*, *supra* at 28.

In the recent case of *United States* v. *Baie*, 2 Cir., 407 F. 2d 905 (1969), the Second Circuit was faced with resolving the identical issue of whether the Fifth Amendment privilege against self-incrimination can be invoked by a defendant-transferor as a defense to a conviction for transferring marihuana without the written order form required by § 4742(a). On the authority of its decision in *United States* v. *Minor*, 2 Cir., 398 F. 2d 511 (1968),* the *Baie* court affirmed the defendant-transferor's conviction and concluded that under the statutory scheme of the Marihuana Tax Act the defendant did not *personally* reveal his own identity and thereby incriminate himself. In substance, the court held that "the privilege against self-incrimination is personal" and is not violated so long as the defendant-transferor does not have to personally provide the incriminatory information.

We respectfully disagree with the holding in *Baie* and feel that the *Minor* decision is not apposite to the resolution of this issue.

While it is manifestly clear that the interplay of § 4742(a) and 4742(c) results in the transferee providing the incriminatory information about the defendant-transferor, it is equally certain that statutory interplay compels the defendant to cause the transferee to reveal such information. The protective boundaries of the privilege are not so narrow as to fail to encompass the situation where one is compelled, under threat of criminal prosecution, to have another incriminate him.

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*The Supreme Court recently granted certiorari in *United States* v. *Minor*, 37 U.S.L.W. 3458 (June 2, 1969).

In determining whether an individual is entitled to the shelter of the Fifth Amendment privilege, we feel that the spirit and philosophy of the privilege against self-incrimination require us to focus our attention on the question of whether the person seeking the insulation of the shelter is compelled, either personally or through another, to provide self-incriminating information. To hold that the shelter of the privilege is contingent solely upon the question of who actually provided the incriminatory material unnecessarily restricts the boundaries of the privilege and thwarts its purpose.

With deference, in our judgment, the *Minor* holding is distinguishable from and is not dispositive of the issue presented by the instant case and that in *Buie*. *Minor* involved the question of whether the privilege against self-incrimination affords a defense to a conviction for selling narcotic drugs (heroin) without the mandatory written order form required by § 4705(a) of the correlative Narcotic Drugs Tax Act. Section 4705(a) makes it unlawful for any person to transfer narcotic drugs except pursuant to a written order form which is to be obtained by the transferee from the appropriate governmental authorities. In affirming the defendant-transferor's § 4705(a) conviction, the *Minor* court held that the defendant's "compliance with § 4705(a) would not have subjected him to the risk of self-incrimination" because the transferor "of narcotic drugs is not required to register *or in any other way to incriminate himself in order to comply fully with the requirements of § 4705(a)*." (Emphasis added.) *United States v. Minor*, *supra* at 514–515. Herein, in our judgment, rests the critical distinction between *Minor* and *Buie*.

As shown, § 4742(a) does have the effect of forcing the defendant-transferor to risk the hazards of self-

incrimination since to comply with the section, the transferor is required to have the transferee obtain the prescribed order form and thereby disclose his identity. Compliance with § 4705(a) does not entail the same risk because under the statutory scheme of the Narcotic Drugs Tax Act the transferee is able to obtain the required order form without revealing the identity of the defendant-transferor. See *Lawler* v. *United States*, 7 Cir., —— F. 2d —— (1969).

On the authority of *Grosso* v. *United States, supra* at 70–72, we are constrained to hold that the appellant did not knowingly waive his constitutional privilege against self-incrimination by failing to raise this defense at trial or upon appeal. It would be anomalous and contravene the precepts of fairness to hold otherwise for at the time of the appellant's trial and appeal the decisions in *Leary*, *Marchetti*, *Grosso* and *Haynes* had not been handed down. It is axiomatic that "unless the defendant is fully aware of a constitutional right, he cannot effectively waive it." *United States* v. *Roseuson*, D.C.E.D. La., 291 F. Supp. 874, 877 (1968). See also *Fay* v. *Noia*, 372 U.S. 391, 439–440 (1963), *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *United States ex rel. O'Connor* v. *State of New Jersey*, 3 Cir., 405 F. 2d 632, 634 (1969). Under the circumstances of the instant case, there is no reason to believe Santos knowingly waived a constitutional right which evolved subsequent to his trial and appeal.[7] Defendants should not be required to antici-

[7] The *Leary* opinion also requires that the constitutional question be raised in timely fashion. By timeliness, we understand the Court to be referring to the doctrine that an issue must first be presented to the district court before it can be argued on appeal. In the present case, in view of the fact that *Marchetti* and its companion cases as well as *Leary* were decided after petitioner's conviction became final on appeal, we

pate favorable Supreme Court rulings "or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of * * * [a favorable forthcoming] decision." *United States* v. *Manfredonia*, 2 Cir., 391 F. 2d 229, 230 (1968).

Our holding is premised upon the reasoning of the foregoing Supreme Court decisions which were handed down after the appellant's conviction became final. Obviously, our decision in this matter assumes that these recent cases should be given retroactive effect. While we are fully aware of the present conflict in the circuits with respect to the resolution of the issue of retroactivity,[1] we are persuaded by the reasoning and the result reached in *United States* v. *Miller*, 4 Cir., 406 F. 2d 1160 (1969). The import of the Fourth Circuit holding is that these cases are entitled to retroactive application under the guidelines set forth in *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

In sum, we conclude that the Supreme Court in *Leary* changed the ground rules and held that the Fifth Amendment privilege against self-incrimination bars a conviction of an unregistered transporter of marihuana who could not comply with the requirements of 26 U.S.C.A. §§ 4741 et seq., without incriminating himself.[2] The learned district court did not have the

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are of the opinion that the presentation of these unwaived constitutional questions to the district court in the petition to vacate and set aside the conviction was timely and that the issues are now properly before us for decision.

[1] In the case of *Graham* v. *United States*, 6 Cir., No. 18725, March 10, 1969, the Sixth Circuit in a per curiam opinion held that *Marchetti* and *Grosso* were not to be applied retroactively to a conviction which became final prior to the date of these decisions.

[2] For a careful analysis of *Leary* and *Covington* see 38 U.S.L.W. 3052–53 (July 29, 1969).

benefit of *Leary* in dismissing appellant's petition for relief under § 2255, Title 28, U.S.C.A.

Having concluded that appellant could not be held to have waived his constitutional right to assert his privilege against self-incrimination and that *Leary* should be given retroactive application to bar his conviction, we are left with no alternative but to reverse and remand with directions.

Accordingly, the judgment of the district court denying appellant's § 2255 petition for relief is reversed, and this cause is remanded to the district court with directions to grant the relief sought in said petition and for any other action required not inconsistent with this opinion.

REVERSED AND REMANDED.

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1968—APRIL SESSION, 1969

No. 16955

LEWIS WARD, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

August 19, 1969

Before MAJOR and HASTINGS, Senior Circuit Judges, and CUMMINGS, Circuit Judge.

PER CURIAM. Lewis Ward, appeals from the district court's denial of his motion, filed pursuant to 28 U.S.C.A. § 2255, for collateral relief from a criminal judgment of conviction entered by that court following a jury trial.

The record reveals that appellant Ward was charged in a two-count indictment with violating federal marihuana statutes. Count one of the indictment charged appellant with violation of 26 U.S.C.A. § 4744(a)(1). Count two of the indictment charged appellant with violation of 26 U.S.C.A. § 4742(a). Following pleas of not guilty, appellant was found guilty on both counts by a jury verdict. Appellant was sentenced to concurrent twelve-year terms on each count. His conviction was affirmed by this court in *United States* v.

Ward, 7 Cir., 360 F. 2d 209 (1966) and the denial of a subsequently filed petition for collateral relief was affirmed by this court in *Ward* v. *United States*, 7 Cir., 387 F. 2d 843 (1967).

In appellant's present § 2255 petition, he contends that his conviction violates his constitutional privilege against self-incrimination, as guaranteed by the Fifth Amendment. In substance, appellant argues that the statutory provisions upon which his conviction is premised, when considered in conjunction with other interrelated sections of the Marihuana Tax Act, are inconsistent with the limitations imposed by the Fifth Amendment privilege against self-incrimination.

In the companion case of *Santos* v. *United States*, Slip Opinion No. 16985, August 19, 1969, this court was faced with the identical issue of whether the privilege against self-incrimination provides a complete defense to convictions obtained for failure to comply with such statutory provisions.

On the basis of the reasoning set forth in the *Santos* opinion, we find that compliance with these provisions has the legal effect of exposing one to a real and appreciable risk of self-incrimination. Under the rationale of the recent Supreme Court decisions in *Leary* v. *United States*, 395 U.S. 6 (1969), *United States* v. *Covington*, 395 U.S. 57 (1969), *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosso* v. *United States*, 390 U.S. 62 (1968), *Haynes* v. *United States*, 390 U.S. 85 (1968) and our decision today in *Santos* v. *United States*, *supra*, we are compelled to hold that the privilege against self-incrimination provides a complete defense to the appellant's convictions.

On the authority of our holding this date in the companion case of *Santos* v. *United States*, *supra*, the

judgment of the district court denying appellant's § 2255 petition is reversed, and this cause is remanded to the district court with directions to grant the relief sought in said petition and for any other action required not inconsistent with this opinion.

REVERSED AND REMANDED.

Office-Supreme Court
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No. 873

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

SHELDON G. PERLMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

SHELDON G. PERLMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The court of appeals rendered no opinion in reversing the judgment of conviction.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*) was entered on September 23, 1969. On October 21, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

369-395—69

QUESTION PRESENTED

Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of transferring marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Other pertinent statutes and regulations are set forth in the Brief for the United States in *Buie* v. *United States*, No. 271, this Term.

STATEMENT

Respondent and Harold J. Dalton were charged in a one-count indictment in the United States District Court for the Northern District of Illinois with transferring a quantity of marihuana not in pursuance of a written order form, in violation of 26 U.S.C. 4742 (a). Following a nonjury trial, respondent was convicted and sentenced to five years' imprisonment.[1]

The evidence showed that in early December 1965, narcotics agent Robert F. Bottorff, acting in an undercover capacity, met Dalton in a tavern in Chicago.

[1] Co-defendant Dalton entered a plea of guilty, and on June 20, 1966, was sentenced to five years' imprisonment. Thereafter, he was deported to Ireland (Tr. 298–299).

Dalton mentioned the possibility of assisting Bottorff in obtaining narcotics from a friend in Morocco, whom he called "Shelley" (Tr. 19–20). When Bottorff expressed interest, Dalton composed a message in language which he said "Shelley" would understand. Bottorff cabled the message to respondent Sheldon Perlman in Tangiers, Morocco (Tr. 20–21). Subsequently, Dalton wrote another letter which he gave to Bottorff with instructions to send it to respondent together with $20 as a "show of faith" (Tr. 25). On December 14, the agent enclosed a $20 money order in the letter and sent it to respondent in an addressed envelope furnished by Dalton (Tr. 25). On the same day Bottorff received a letter from respondent indicating that he could supply hashish (Tr. 30–31). A small quantity of hashish encased in a metal foil inserted in a Christmas card was received from respondent on December 31 (Tr. 83). A few days later Bottorff met with Dalton and expressed satisfaction with the quality of the hashish (Tr. 89). For the next two months, the agent and Dalton corresponded regularly with respondent to arrange for a future delivery; all letters were addressed to "Sheldon Perlman" or "Shelley Perlman", in care of American Express, Tangiers, Morocco (Tr. 126). In one letter Bottorff, acting on Dalton's instructions, sent respondent a $100 money order to be used to offset expenses incurred by respondent in acquiring the hashish and corresponding with Dalton and Bottorff (Tr. 95).

On March 15, 1966, Dalton telephoned Bottorff to inform him that a French-language magazine in which hashish had been secreted had been received from re-

spondent (Tr. 112–113). Later that day Bottorff gave Dalton $100, and received the magazine. In some of the inner pages of the magazine a rectangle approximately three by five inches had been cut out, and a metal foil, containing more than 24 grams of hashish, inserted (Tr. 114, 242). No written order forms had ever been sent to respondent by Bottorff as required by the Marihuana Tax Act (Tr. 121). Respondent was arrested on July 25, 1967, at O'Hare International Airport (Tr. 153).[2]

While the case was pending on appeal to the Seventh Circuit, respondent filed a "Motion for Per Curiam Judgment of Reversal" (Appendix B, *infra*), contending that his conviction under 26 U.S.C. 4742(a) violated his privilege against self-incrimination; he relied on several decisions of that court sustaining self-incrimination challenges to convictions under 26 U.S.C. 4742(a) on the authority of *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57. On September 23, 1969, the court of appeals, without argument or brief from the

[2] To establish that respondent was the party in Morocco engaged in the marihuana transaction, the government adduced evidence at trial showing that he had been out of the United States at the time the transaction occurred. In addition, a handwriting expert compared respondent's signature and other writing on passport documents with the handwriting on the letters received by agent Bottorff and concluded that they had been written by the same individual (Tr. 180–252).

government, entered an order reversing the judgment of conviction "in view of this Court's holdings in the cases cited in defendant-appellant's motion for judgment of reversal" (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

The question presented by this case is identical to the question before this Court in *Buie* v. *United States*, No. 271, this Term, which was argued in the October Session and is now pending decision.

Unlike the statutory provisions involved in *Leary* and *Covington, supra*, compliance with Section 4742 (a) does not require a transferor of marihuana himself to disclose any information at all: the statute merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of the Treasury. As we argue fully in our brief in *Buie*, on which we rely here, the fact that the *transferee* must disclose the name and address of the prospective transferor in order to secure an order form does not impose any obligation of *self*-incrimination on the transferor. Nothing in the statute requires the transferor to supply that information, and—as demonstrated by the facts of the present case, in which the agent learned respondent's name and address from an intermediary—there is no basis for any assumption that such information can be obtained only from the transferor.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted and judgment should be entered in accordance with this Court's disposition in *Buie* v. *United States, supra.*

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

NOVEMBER 1969.

APPENDIXES

APPENDIX A

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Tuesday, September 23, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 17543

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHELDON G. PERLMAN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

On consideration of the motion of defendant-appellant for the entry of a judgment to reverse defendant-appellant's judgment of conviction.

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, be and the same is hereby reversed, in view of this Court's holdings in the cases cited in defendant-appellant's motion for judgment of reversal.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

No. 17543

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHELDON G. PERLMAN, DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S MOTION FOR PER CURIAM JUDGMENT OF REVERSAL

Now comes SHELDON G. PERLMAN by MAURICE J. WALSH and CARL M. WALSH, his attorneys, and moves this Court to enter its Per Curiam Judgment reversing the defendant-appellant's judgment of conviction.

In support of this motion, it is stated:

1. The Government has filed a motion to extend time in which it may file its brief and appendix in which it states that the defendant-appellant has been convicted of a violation of 26 U.S.C. 4742(a).

2. In that same motion, the Government also concedes that the United States Supreme Court has held in *Leary* v. *United States,* 395 U.S. 6, that a portion of 26 U.S.C. 4744(a)(2) is unconstitutional in violation of the Fifth Amendment. The Government further notes that this Court has held in *Santos* v. *United States,* —— F. 2d —— (No. 16985, August 19, 1969, 7 Cir.) that 26 U.S.C. 4742(a) (the statute for which the defendant-appellant has been convicted of violating) is also unconstitutional in violation of the Fifth Amendment privilege against self-incrimination.

3. This Court has also, in its Per Curiam decision in *Ward* v. *United States*, —— F. 2d —— (No. 16955, August 19, 1969, 7 Cir.) and its opinion in *United States* v. *Reynolds*, —— F. 2d —— (No. 16921, September 2, 1969, 7 Cir.) held that 26 U.S.C. 4742(a) is violative of the Fifth Amendment privilege against self-incrimination, and that a conviction based upon a violation of that statute cannot stand. This Court, in those decisions, relied upon and cited the Supreme Court's decisions in *Leary* v. *United States*, 395 U.S. 6; *United States* v. *Covington*, 395 U.S. 57, *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85.

Six Judges of this Court have thus concurred in the conclusion that 26 U.S.C. 4742(a) is unconstitutional.

4. Although this Court concluded in *Santos* v. *United States* that "Defendants should not be required to anticipate favorable Supreme Court rulings or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of * * * [a favorable forthcoming] decision." (No. 16985, slip opinion, p. 7), it should be noted that this defendant-appellant moved prior to trial, during trial, and post-trial, to dismiss his one-count indictment charging him with violating 26 U.S.C. 4742(a) as being barred by the Fifth Amendment.

Further, the denial of these motions is the first assignment of error appearing in the defendant-appellant's brief (pp. 1, 13).

It is thus suggested that since six Judges of this Court have now concurred in the conclusion that 26 U.S.C. 4742(a) is unconstitutional, and that the Government has conceded that the defendant-appellant

was convicted of violating that statute only, that no purpose is served in delaying decision of this appeal.

WHEREFORE, the Defendant-Appellant prays that this Court enter a Per Curiam Judgment reversing his judgment of conviction.

By SHELDON G. PERLMAN,
Defendant-Appellant,
CARL M. WALSH,
One of His Attorneys.

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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Petitioner,

vs.

EFRAIN SANTOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT SANTOS IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 861

UNITED STATES OF AMERICA,

Petitioner,

vs.

EFRAIN SANTOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT SANTOS IN OPPOSITION

Opinion Below

The Opinion of the Court of Appeals is reported as *Santos v. United States*, 417 F.2d 340.

Jurisdiction

The judgment of the Court of Appeals was entered August 19, 1969. The government filed no petition for rehearing. It filed its petition for a writ of certiorari on November 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was respondent's Fifth Amendment privilege violated when the same indictment charged him under 26 U.S.C. 4742(a) and 4744(a)?

2. Although the Court of Appeals did not pass upon the question of claimed ineffective assistance of counsel, because of reversal on other grounds, ought this Court finally conclude the limited issue presented by the government without remanding to the Court below for consideration of other issues raised?

3. Is this the proper case to determine the retroactivity issue?

STATEMENT

Respondent accepts petitioner's Statement of the Case.

Argument

Two reasons are presented in support of the government's request for a writ of certiorari: (1) inasmuch as this Court has decided *Buie* v. *United States* ..... U.S. ....., 24 L.ed 2d 283 (No. 271, December 8, 1969) adverse to defendant and sustained the validity of 26 USC 4742(a), it is argued that certiorari should be granted to reverse the decision of the court below; and (2) irrespective of the result in *Buie*, it is further and alternatively argued that this court should grant certiorari to determine the retroactivity of *Leary* v. *United States*, 395 U.S. 6 and *Covington* v. *United States*, 395 U.S. 57. (Petition, pp. 5-6).

Respondent, Santos, respectfully submits that neither reason supports granting of the writ under the peculiar factual circumstances present in the instant case.

1.

As defendant was charged in the same indictment with violation of both 4742(a) and 4744(a), Title 26, U.S.C. it is clear that his Fifth Amendment privilege against self-incrimination was effectively violated.

Respondent submits that certiorari should be denied because joinder of a charge of violation of 26 U.S.C. 4744(a) (1) with a charge of violation of 26 U.S.C. 4742(a) effectively violated defendant's Fifth Amendment privilege against self-incrimination within the meaning of *Leary*, because under section 4744 (a) (1), he was required to expose himself to the authorities as a possessor of marijuana, thereby incriminating himself under both statutes named in the indictment.

Defendant was charged as a transferee in violation of 26 U.S.C. 4744 (a) (1) (by being a transferee who failed to pay the tax) and as a transferor in violation of 26 U.S.C. 4742(a) (by being a transferor not in pursuance of a written order form). Appreciating the significance and important distinction, recognized in and underlying this Court's decision in *Buie* between a transferee and a transferor (who is not, according to *Buie*, required to incriminate himself because the buyer, not the seller, is required to obtain the order form), petitioner submits this distinction is of no legal or constitutional significance in the instant case, because respondent was charged as *both buyer and seller in the same indictment.*

The importance of the joint charge in the instant case — as compared to a violation of 4742(a) alone, in *Buie* — is best and readily appreciated by a reading of *Leary.* In *Leary,* this Court held that petitioner's Fifth Amendment privilege was violated because to comply with the statutes there in question (26 U.S.C. 4741(a) and 4744(a)), petitioner would have to provide "a significant 'link in a chain' of evidence tending to establish his guilt." *Leary* v. *United States,* 395 U.S. 6, 16. (quoting *Marchetti* v. *United States,* 390 U.S. 39, 48). In other words, petitioner in *Leary,* who as an unregistered possessor of marijuana was part of a "selective group inherently suspect of criminal activities," would be required by compliance with the statute, " . . . unmistakenly to identify himself as a member of this 'selective' and 'suspect' group." The "real and appreciable" hazard of incrimination (*Leary,* p. 18) of course, resulted from the fact that petitioner must disclose his identity as a "suspect" possessor of marijuana.

Turning to the facts of the instant case, it is obvious that as respects one count of the indictment, charging respondent Santos with a violation of 4744(a) (1), a simi-

lar real and appreciable hazard of self-incrimination and exposure as a violator of that statute existed by virtue of the disclosure requirements, and the court below, applying *Leary* correctly, reversed the judgment of conviction under that statute.

But how could Santos in the instant case expose himself as a violator of 4744(a) (1) without also exposing himself as a violator or potential violator of 4742? The risk of *exposure* as a violator of both Sections in the instant case, of course, results from the fact that Santos was charged with a violation of both statutes.

We submit that the significant factor in *Leary* (a factor totally absent in *Buie*) was the risk of exposure by the requirement that Santos identify himself as a transferee not necessarily exposure as a violator of a particular federal statute — but exposure as a violator of any one of the federal — and for that matter State* — laws governing the sale and purchase of marijuana. Applying the exposure criterion to the instant facts and reading the indictments as a whole as it must be read,** it is apparent that in *Buie* there was no risk or requirement of exposure, whereas in *Leary* and the instant case there was.

The importance of consideration of the entire indictment is apparent from the emphasis placed in both *Leary* and by the court below upon the "statutory scheme" of the marijuana laws. Where, as here, the "scheme" results in a Fifth Amendment violation, the conviction must be reversed.

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* Cf. *Marchetti* v. *United States*, 390 U.S. 39, 44-48.

** Importantly, in this context, is the fact that the government drew the indictment and therefore placed petitioner in the position where, to comply with 4744(a) (1) he must have necessarily incriminated himself as to 4742(a), as well.

Accordingly the court below, admittedly using different reasoning, reached the correct result in reversing defendant's judgment of conviction on all counts. The petition for a writ of certiorari should therefore be denied.

In the event this court rejects the position here taken, we submit the judgment of the Court of Appeals should not be summarily reversed on the basis of *Buie*, but that the issue here raised should be argued to the Court.

2.

Independent grounds for reversal of original conviction.

Respondent presented to the Court of Appeals a separate and distinct argument — based on ineffective assistance of counsel—which the Court of Appeals explicitly found it unnecessary to consider.* To assure full review of this issue in the event this Court agrees with the government that the petition should be granted, it is respectfully requested that the judgment not be summarily reversed, but that the same be vacated to allow consideration of the other issue presented to the court below.

3.

This is not a proper case for determination of the retroactivity issue which in any event has been correctly determined in favor of retroactivity.

This case — not involving the statutes held unconstitutional in *Marchetti, Grosso* and *Haynes*** —is clearly not a proper vehicle for determining the retroactivity of those decisions, whose retroactivity is best determined by cases

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* See 417 F. 2d 340, 342, n. 1.

** *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

arising specifically under the statutes with which those cases were directly concerned. Important in this context is the observation that the court below considered and decided only the retroactivity of the *Leary* and *Covington* cases and was presented with no argument concerning the statutes involved in the *Marchetti-Grosso-Haynes* trilogy.

As respects *Leary* and *Covington*, it should be observed that the petition, while citing various conflicting district court and Court of Appeals decisions respecting retroactivity of *Marchetti*, *Grosso* and *Haynes*, points to no such conflict as respects the retroactivity of *Leary* and *Covington*, but points only to a decision identical to that reached by the Court below, in *Rowell* v. *United States*, ... F.2d ..... (No. 19,388, 8 Cir., July 23, 1969). Respondent submits, for the reasons outlined below, that these decisions are correct and should be left undisturbed.

The petition (p. 8) sets forth and relies upon the three criteria for determining retroactivity last enunciated by this Court in *Halliday* v. *United States*, 394 U.S. 831, 832. Applying these criteria to the circumstances of the instant case, it is apparent that the Court below reached the correct results as respects retroactivity of *Leary* and *Covington*.

1. The purpose of the rule.

The purpose of the rule announced in *Leary* is clearly distinguishable and totally different from the type of constitutional rights and privileges denied retroactive application in recent decisions by this Court and of course distinguishable from violations of federal rules as opposed to constitutional provisions. (cf. *Halliday* v. *United States*, 394 U.S. 831). The most significant recent recognition of

Fourth, Fifth and Sixth Amendment rights in the *Escobedo-Miranda* and other cases,* has as their inception, the prophylactic principle of deterring police conduct deemed inconsistent with the Constitution.

A totally different purpose is present in *Leary* and *Covington*, namely that an individual not be convicted on an unconstitutional statute. The government cites no decision, and we find none, where this Court has denied retroactive application to a decision invalidating a federal statute. Surely, if procedural rights affecting the trial require retroactive application (e.g., *Bruton* v. *United States*, 391 U.S. 123, *Roberts* v. *Russell*, 392 U.S. 293), a decision declaring certain statutes unconstitutional should not be denied retroactive application.

2. The extent to which law enforcement authorities have relied upon the old rule.

The contention of the government that law enforcement authorities have relied upon the old rule in numerous cases is deceptive. The criterion here referred to has, as its origin, situations where the police have acted affirmatively in performing their duties (or have neglected to perform certain acts now required of them; e.g. *Miranda*, *Escobedo* and *Alderman*) and cases involving the conduct of trials. (But cf. *Bruton* v. *United States*). Clearly, in these situations what is done cannot be undone, or for that matter, is most situations, redone. No such circumstances exist in the instant case where there are no confessions illegally obtained, no constitutionally defective searches, no illegal admission of co-defendant's statements which would necessitate a new trial. In the instant case the

* *Mapp* v. *Ohio*, 367 U.S. 643; *Alderman* v. *United States*, 394 U.S. 165.

government has simply been allowed to rely passively upon failure of a defendant to act in a given situation — a reliance of no significance as respects retroactivity. In a very real sense, there has therefore been no reliance upon the "old rule".

3. The effect of retroactive application on the administration of justice.

The government observes, in its argument opposing retroactivity, that substantial numbers of persons are serving sentences imposed for pre-*Leary* and pre-*Covington* convictions. Presumably, release of these prisoners would somehow "increase" the burden on the administration of justice. Respondent suggests that precisely the opposite result would flow from retroactivity — the release of prisoners would most certainly *decrease* the burdens of administering the federal prison system, now administered by the Department of Justice.

Also, release of the persons convicted illegally under *Leary* would not result (as it does in *Bruton* situations) in retrial, and would not therefore also increase the burden on the courts.

It is no answer to suggest, as the government does (Petn. p. 11), that hearings would be required to consider the "timeliness" of defendants' reliance on the Fifth Amendment. That argument ignores the very issue the government would have this Court decide, namely, retroactivity, for if *Leary* and *Covington* are applied retroactively, the privilege need not be "timely" asserted. Similarly, waiver would not have to be determined if there is retroactive application, for as observed in the well reasoned opinion below:

> "It is axiomatic that 'unless the defendant is fully aware of a constitutional right, he cannot effectively waive it. *United States* v. *Rosensen*, D.C.E.D. La. 291 F. Supp. 874, 887 (1968)." *Santos* v. *United States*, 417 F.2d at 345.

Clearly respondent could not be held to have waived the constitutionality of the statute pursuant to which he was convicted.

The government's waiver argument also fails to appreciate the distinction between the testimonial privilege against self-incrimination and the non-testimonial privilege. Dealing as we are with the non-testimonial privilege, it is difficult to conceive of a situation where there could be a "knowing and intelligent" waiver — except where defendant complied with the registration requirement and at that time executed a waiver form.

Conclusion

For these reasons, it is respectfully submitted that the court below correctly accorded *Leary* and *Covington* retroactive application and that certiorari be denied.

Respectfully submitted,

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No. 873

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Petitioner,

vs.

SHELDON G. PERLMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Court of Appeals rendered no opinion in reversing the judgment of conviction, other than to state that its judgment of reversal, was in view of the holdings of the United States Court of Appeals for the Seventh Circuit in the cases cited in the defendant-appellant's motion for judgment of reversal.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, Petition for Certiorari), was entered September 23, 1969. The Petition for Certiorari was filed November 21, 1969 under an extension of time for filing the Petition for Writ of Certiorari granted by Mr. Justice Marshall on October 1, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the assertion of the privilege against self-incrimination provide a complete defense to a charge of transferring marijuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a)?

2. Where the government fails to prove either the existence or non-existence of an order form prescribed by the scheme of laws governing marijuana transactions, insofar as the transaction prosecuted is concerned, must the defendant help convict himself by admitting he received no such order form, or assume a shifted burden of proof to show that he did receive one and thus incriminate himself in illegal traffic in marijuana?

3. Should the law contained in the opinion in *Minor* v. *United States,* No. 189, and *Buie* v. *United States,* No. 271, (38 L.W. 4019) decided December 8, 1969, be retroactive and apply to judgments of Courts of Appeal in other cases rendered before the decision of this Court in the *Minor* and *Buie* cases?

4. Do the statutes and regulations governing purchase and sale and distribution of marijuana within the United States require that a person located in Tangier, Morocco, obtain an order form before shipping marijuana to an individual in the United States?

STATUTES AND REGULATIONS INVOLVED

"26 U.S.C. 4742(a):

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Other relevant statutes and regulations are 26 U.S.C. 4741-4744, 4751, 4753-4755, 4761(4), 4771, 4773, 4774, 4775; 26 C.F.R. 152.63, 152.66, 152.105.

STATEMENT

After a jury-waived trial, the respondent was convicted in the United States District Court for the Northern District of Illinois, under a single-count indictment which charged that on or about March 15, 1966, Harold J. Dalton and Sheldon G. Perlman, the respondent, did unlawfully transfer approximately 24.583 grams of marijuana to Robert F. Bottorff, not in pursuance of a written order on a form issued by the Secretary of Treasury and prescribed by the Statute, Section 4742(a), Title 26 U.S.C. The indictment was returned on May 24, 1966.

On June 20, 1966, the co-defendant Harold J. Dalton entered a plea of guilty and was sentenced to the custody of the Attorney General for 5 years (R. 5, A. 5).

The respondent, Sheldon G. Perlman, was absent from the country at all times referred to in the indictment and for a long time thereafter, so that the case, on motion of the government, was stricken from the call with leave to reinstate after the conviction on plea of guilty of defendant Dalton (R. 9).

On December 11, 1967, the respondent Perlman entered a plea of Not Guilty, after his voluntary return to the country. He was given leave to file motions on or before January 1, 1968, and the cause was continued until January 22, 1968, to be set for trial (R. 11). On January 17, 1968, the respondent Perlman moved for the production of co-defendant Harold J. Dalton, who was presumably in custody, for an interview, and that motion was continued until January 22, 1968. The motion of the defendant Perlman was again continued until February 5, 1968, the government sought and obtained 15 days to answer Perlman's motions for particulars and for production, and the cause was continued until March 4, 1968 (R. 12, 13, 14). Dalton, however, had been deported by the government on January 2, 1968, and thereafter has never been found.

On April 18, 1968, the respondent Perlman filed a motion for disclosure of evidence obtained from and concerning the co-defendant Harold J. Dalton, and after hearing on May 3, 1968, the said motion was granted (R. 15, 16). On October 21, 1968, the Court denied the defendant Perlman's motion to dismiss the indictment because of the removal of an essential and participating co-defendant witness from the jurisdiction of the court by the United States; and the motion of the respondent to dismiss the indictment because barred by the invalidity of the statute under which it was brought, and motion to dismiss the indictment because the prosecution was in violation of the Fifth Amendment, were denied (R. 22).

The government proved in great detail the mailing to Agent Bottorff (undercover) in Chicago, Illinois, of a small packet of hashish (marijuana) enclosed in a Christmas card from Tangier, Morocco, where the respondent was

then living. The respondent was indicated by the proof as the mailer in Tangier. This Christmas card was received by Agent Bottorff on December 31, 1965.

This mailing of hashish from Tangier in December, 1965 was not prosecuted, and no notice of such proof was given in the single count indictment which prosecuted an alleged transaction on March 15, 1966. No other pleading indicated any claim of such a transaction.

The proof concerning the event charged in the indictment indicated receipt by Agent Bottorff of 24 plus grams of hashish from Dalton the co-defendant in Chicago, on March 15, 1966 (Gov. Ex. 21, Tr. 257-264). The proof shows that Bottorff paid Dalton one hundred dollars at the time of Dalton's delivery of it. While Dalton's conversations with Bottorff indicated that he had received the hashish in a French language magazine, which had been carved out to provide a hollow space which would hold the small package, Bottorff did not see the magazine before it had been opened and the hashish removed. Bottorff's version of Dalton's hearsay description of its receipt, was admitted over objection. Of course, Dalton, a leading participant, whose conversations with Bottorff were essential to the government's case, did not appear to confront the respondent, and was not available, because of Dalton's deportation.

The only proof that the hashish, mentioned in the charge, originated or was mailed from Tangiers to Chicago, was Dalton's hearsay to Bottorff (Tr. 112-118, Gov. Ex. 18, 19, 20, 21).

The only proof concerning the existence of "order forms" was Bottorff's statement that he did not give respondent Perlman such a form, nor did anyone, in his presence, ever give Sheldon Perlman such a form (Tr. 121).

On cross, Agent Bottorff said he did not know whether Dalton gave Perlman a request or form from the Treasury Department (Tr. 122).

Defendant's Group Exhibit 6, showed Dalton was paroled from prison for deportation on January 2, 1968 (Tr. 295-301).

The respondent did not testify. His motions for acquittal were denied, and he was sentenced to 5 years imprisonment.

REASONS FOR DENYING THE WRIT

1. The proof in the trial court showed that at all times involved in this prosecution, the defendant was a resident of Tangier, Morocco. Any conduct of his which in any way implicated him in this matter was therefore performed in a foreign country.

It is respectfully urged that the scheme of laws and regulations relied upon by the government for the regulation of domestic transactions and transfers of marijuana do not apply to a person who is not within United States territory.

The government's proof in the case at bar does not indicate or establish whether there was a treasury order form delivered to Perlman by Dalton, who was the alleged recipient of hashish from Tangier, Morocco on March 15, 1966. The only evidence tending to show anything about order forms is at Pages 121 and 122 of the transcript of proceedings as shown in the footnote below.[1]

---

[1] "Q. Did you ever give the defendant Sheldon Perlman a written order form for the transfer of marijuana issued in blank by the Secretary of the Treasury or his delegate?

"A. No.

"Q. Did anyone in your presence ever give the defendant Perlman such an order form?

"A. No.

* * *

"Q. Everything you have heretofore testified to, did this occur in Chicago, Illinois, the State of Illinois?

"A. Yes, sir.

"Mr. Breakstone: I have no further questions.

Cross Examination

"By Mr. Walsh:

"Q. Mr. Bottorff, of your knowledge, you don't know whether Mr. Dalton gave Mr. Perlman a request or a form from the Treasury Department; do you?

"A. Not of my personal knowledge, no, sir."

* * *

It is obvious that from this proof, the order form prescribed by statute and charged in the indictment to be nonexistent, may actually have existed and been delivered to Perlman under the record here. Surely, Perlman was under no obligation to prove that he had not received such a form, or for that matter, that he did receive a form. He elected not to testify. Indeed, whether a person in his status as a resident of a foreign country, could be required to secure and maintain such an order form when the form would prove and establish a violation of Section 176(a) of Title 21 forbidding the clandestine smuggling of marijuana into the United States, is very questionable.

The order form is not appropriate or applicable to the case at bar in the view of the respondent.

However, if it is to be considered that a non-resident of the United States must obtain and maintain for inspection in Tangier, Morocco, an order form showing his participation in unlawful smuggling of marijuana, then the form becomes self-incriminatory when applied to the facts in this case.

2. Throughout the pendency of this case in the District Court, the respondent urged the Judge to withhold final judgment until the cases of *United States* v. *Covington*, 395 U.S. 57 and *Leary* v. *United States*, 395 U.S. 6, were decided by this Court. The trial judge chose to disregard the *Covington* decision which was believed by counsel for the respondent to be appropriate and governing in the case at bar. When the matter reached the Court of Appeals for the Seventh Circuit, that Court had decided several cases—*Ward* v. *United States*, ... F.2d ..... (No. 16955, August 19, 1969, 7 Cir.), and *United States* v. *Reynolds*, ... F.2d ..... (No. 16921, September 2, 1969, relying

upon *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62; and *Haynes* v. *United States,* 390 U.S. 85), the Supreme Court's decisions in *Leary* v. *United States,* 395 U.S. 6, and *United States* v. *Covington,* 395 U.S. 57. The Government failed to file its brief, although its time had expired three times, stating that it wished to withhold its brief until this Court had decided *Buie* v. *United States,* No. 271, October Term 1969. It is respectfully suggested that the *Covington* decision is good law and is applicable to the case at bar even though the respondent is alleged to be a supplier, since to compel him to maintain a written order form issued by the Treasury Department in Tangier for marijuana clandestinely sent to the United States, would obviously incriminate him under 21 U.S. 176(a).

It is also respectfully suggested that this Court, in the *Buie* decision, did not have before it the question of incrimination under 21 U.S.C. 176(a).

The respondent urges that he was not subject to the statute under which he was prosecuted since he was a foreign resident, and the statute had no effect in Tangier, Morocco; and that observance of Title 26, Section 4742, and associated statutes requiring the maintenance of the record, would certainly tend to incriminate him if the facts purported to have been proved by the government are true.

Unquestionably, the transfer statutes requiring order forms are confined to transactions within the United States. *Thomas* v. *United States,* 314 F.2d 936, 939 supports this view and holds that one who brings marijuana into the United States from Mexico is not subject to the order forms

and transfer tax provisions because those sections contemplate a transfer within the United States. To the same effect, is *Marquez-Anaja* v. *United States*, 319 F.2d 610.

It is further urged that the charge against the defendant is the "transfer" of marijuana not pursuant to an order form in violation of Section 4742. Title 26, Section 4761(4) provides as follows:

> " * * *
>
> "(4) *Transfer or transferred.*—the term 'transfer' or 'transferred' means any type of disposition resulting in a change of possession, * * *"

It would appear that Perlman had accomplished a type of disposition resulting in a change of possession when he sent the hashish (marijuana) to Dalton. His act occurred in Tangier, Morocco.

Further, any doubt on this question seems to be dispelled by the provisions of Section 4774 of Title 26 which provides that the provisions of Sections 4701 to 4704 inclusive, and sections 4721 to 4776 inclusive, should apply to the several states, the District of Columbia, and the insular possessions of the United States, and in the case of narcotic drugs, shall also apply to the trust territory of the Pacific Islands and to the Canal Zone.

The respondent Perlman performed all acts in which he was involved under the evidence in Tangier, Morocco, and did not return to the United States for a substantial period of time thereafter. He was not subject to prosecution or conviction since the Sections are specifically inapplicable by statutory statement to Morocco (26 U.S.C. 4774).

The Court is respectfully urged to deny the government's Petition for a Writ of Certiorari, but suggests that if this Court sees fit to grant the Writ of Certiorari and to reverse the *per curiam* order of the Court of Appeals, which ruled upon a single one of the several substantial points made by the respondent in his appeal to the Court of Appeals, the case should therefore be remanded to the Court of Appeals so that the United States could be required to file its brief in that Court as provided by law.

Respectfully submitted,

MAURICE J. WALSH
CARL M. WALSH,
Attorneys for Respondent.

December 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES *v.* SANTOS, ET AL.; and
UNITED STATES *v.* PERLMAN

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 861 and 873. Decided February 24, 1970

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Buie* v. *United States*, 396 U. S. 87.